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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

ALBERT P. MORETTI,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on November 26, 1965.

OPINION BELOW

The opinion of the Court of Appeals is thus far unreported, and is reprinted in Petitioner's Appendix. Related opinions are also printed in Appendix A (p 18*a*).*

* References in parentheses are to Petitioner's Appendix.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are the Fourth and Fifth Amendments.

STATUTORY PROVISIONS

The statutes involved are 26 U.S.C. Sections 4401, 4411, 4412, 7203 and 18 U.S.C. 3109.

STATEMENT OF THE CASE

On October 1, 1964, Special Agent Thomas E. Grillo executed an affidavit purporting to establish that Petitioner was engaged in bookmaking activities and had concealed in his apartment certain material in violation of Title 26 United States Code, Sections 4401, 4411, 4412, 7203 (pp 37*a*-40*a*). Also submitted with the affidavit were a chart prepared by Special Agent Victor D. Palaza (p 41*a*), and an affidavit of Special Agent George Politis (p 42*a*). The search warrant was issued (p 43*a*) on October 1, 1964. On October 8, 1964, according to his affidavit (p 45*a*) Special Agent Antonio J. Lupino, armed with the search warrant, went to Petitioner's apartment, knocked on the door, announced his authority and purpose, waited 20-25 seconds and not having heard a response, gave instructions to break the door down. Based upon the material and evidence seized in Petitioner's apartment the United States Attorney

issued a two count information (p 44a) charging violations of 26 United States Code, Sections 4411 and 4401. A plea of not guilty was entered by Petitioner.

After notifying the District Court and the Government of his intention to appeal, the Petitioner submitted and the Court accepted his plea of Nolo Contendere to Count One of the Information, on February 16, 1965. Petitioner was sentenced to be imprisoned for a period of one year and fined Three Thousand Dollars, execution of the term of imprisonment to be suspended after four months, and the Petitioner was thereafter to be placed on probation for two years.

Thereafter, Petitioner appealed to the Court of Appeals for the Second Circuit; on November 26, 1965, his conviction was affirmed.

ISSUES PRESENTED

I. THE REGISTRATION PROVISIONS OF 26 U.S.C., Sections 4401, 4411 and 4412 VIOLATE THE FIFTH AMENDMENT.

II. THE FOURTH AMENDMENT ISSUES SURVIVED THE PLEA OF NOLO CONTENDRE.

III. THE AFFIDAVITS WERE INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

IV. THE AGENTS WERE NOT REFUSED ENTRY WITHIN THE MEANING OF 18 U.S.C. 3109.

REASONS FOR GRANTING THE WRIT.

I. The Registration Provisions Violate the Fifth Amendment.

This Court has decided on two occasions that the registration provisions relating to the federal occupational tax stamp are not violative of the Fifth Amendment privilege against self-incrimination. See *U.S.* v. *Kahriger* 345 U.S. 22 and *U.S.* v. *Lewis* 348 U.S. 419.

While at first blush *Lewis* appears to be no more than an affirmation of *Kahriger*, in reality the decisions stand upon entirely different footings. *Kahriger* held that the privilege relates only to past acts, and since the registration provisions require disclosures only as to future acts there was not a violation of the privilege. In *Lewis*, where the distinction between past and future acts was not so clear because federal laws in the District of Columbia prohibited wagering, the Court based its decision upon the fact that the registration provisions cannot be called compulsory.

Subsequent decisions by this Court, enlarging and restating the principle and purpose of the privilege against self-incrimination, necessitate a more explicit and definitive application of the privilege to the registration provisions of the federal wagering tax laws.

The result in *Kahriger* followed logically from *U.S.* v. *Murdock*, 284 U.S. 141. However, *Murdock* was expressly overruled in *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, the latter case holding that the privilege protects against a disclosure to federal authorities that might incriminate under state law. Prior to *Murphy* the registrant was protected from disclosing to federal authorities only that information that could subject him to prosecution under federal law. Since

Kahriger could not claim that his disclosure would incriminate him under state law, and since the only possible incrimination under federal law related to acts *in futoro*, the privilege was held not to have been violated.

However, with the enlargement of the privilege by *Murphy*, the disclosures can no longer be classified as harmlessly relating to future acts. By encompassing the possibility of state prosecution within the privilege against self-incrimination the court demonstrated its recognition that, "in our age of 'cooperative federalism' where the Federal and State Governments are waging a united front against many types of criminal activity" the privilege must be protected in both spheres. cf. *Murphy* v. *Waterfront Comm., supra,* pp. 55-56.

In determining the extent of the privilege, therefore, we cannot confine ourselves merely to a consideration of incrimination under federal law, as was done in *Kahriger*. Indeed, if we do, the inevitable conclusion must be that there is no violation of the privilege because there are no federal laws making wagering a crime; and the registration disclosed merely an intention to engage in wagering. *Murphy* requires that we consider the possibility of state prosecution, and, when we do, the plethora of state criminal gambling statutes obviously makes registration a disclosure of past acts, not simply future intention.

In Connecticut, for example, the registrant exposes himself to prosecution under Sections 53-271 to 53-279, Secs. 53-295 to 53-297. (p 32*a*-37*a*).

Aside from violations of the substantive law, the Connecticut registrant exposes himself to prosecution under Sec. 54-197 for conspiracy, a conviction of which can certainly be obtained from the information required to be supplied in the registration

form. The registration, if complied with, provides state authorities with crystal clear evidence that the registrant has, for example, combined or confederated with others for the purpose of engaging in the business of wagering; cf. *State* v. *Fallaice*, 134 Conn. 181. Certainly the listing of employees and agents on I.R.S. form 11-c (p 48*a*) as required by 26 U.S.C. Sections 4412 (p 29*a*) and 6011 is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the business of wagering. Disclosure of the business address at which wagering is carried on could lead authorities to a lease, purchase of real estate or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin*, 132 Conn. 325, 340.

Far from a harmless expression of future acts, the disclosures present a very real danger to the registrant, a link in the chain of evidence that may be used against him in a state prosecution. He is constitutionally privileged not to disclose the information required. *Malloy* v. *Hogan*, 378 U.S. 1.

Lewis v. *U.S.*, *supra*, presents a different obstacle in the assertion of petitioner's privilege, for that case held that the registration was not compulsory.

While compulsion in connection with the privilege against self-incrimination may traditionlly have been looked upon as some form of torture, it certainly is not so viewed today. In *Malloy* v. *Hogan*, *supra*, we find that compulsion is equated with, among other things, a threat of imprisonment.

A recent case, *Albertson* v. *Committee on Subversive Activities* — *U.S.* — holds that a person cannot be forced to choose between incriminating himself and going to jail. The latter case is particularly apposite to the case at bar, for it involved registration of Communist Party members, who would,

upon completing the registration form, expose themselves to federal prosecution. The possibility that the federal government would prosecute those registering as Communist Party members together with the criminal penalties involved for not registering prompted this Court to reverse the conviction because the statute required the registering Communist to incriminate himself. The statute compelled self-incrimination because it imposed a criminal penalty for not complying with its command of registration.

This Petitioner was under just as much compulsion to register by the statute that afforded the basis for his conviction.

Moreover, the *Albertson* case distinguishes *U.S.* v. *Sullivan* 274 *U.S.* 259, wherein it was held that, in a prosecution for failing to file income tax returns, the privilege against self-incrimination did not apply because no return was filed at all by the defendant. The criminal atmosphere surrounding the Communist registration statute was held sufficient justification, under the Fifth Amendment, for a total refusal to register. The same atmosphere surrounds the gambling registrant, and the same reasoning must justify his failure and/or refusal to register under the wagering law.

In their time, *Kahriger* and *Lewis* correctly expounded the scope of the privilege against self-incrimination. They can no longer be reconciled with more recent decisions so as to deny Petitioner's claim that his Fifth Amendment privilege against self-incrimination protects him from registering. The information required by the registration form "might be used as evidence in or at least supply investigatory leads to a criminal prosecution." *Albertson* v. *Subversive Activities Control Board* — *U.S.* — 34 LW 4014, 4016. Furthermore, the so-called prospective operation of the wagering tax laws referred to in *Kahriger* and *Lewis* as the basis of finding that the Fifth Amend-

ment was not infringed upon by the registration provisions has been nullified by *Albertson*. The latter case holds that the privilege is violated despite the fact that Communist Party members could terminate their membership within 30 days after entry of a Section 786(a) order directed to the party and thus avoid individual registration. *Ibid.* 34 LW 4014.

II. The Fourth Amendment Issues Survived the Plea of Nolo Contendere.

Admittedly, under ordinary circumstances, Fourth Amendment issues do not survive a plea of nolo contendere. However, in this case, Petitioner notified the District Court and the prosecutor of his intention to appeal before entering a plea of nolo contendere. While this reservation does not appear on the record, it was recited in Petitioner's statement of facts included in his appeal to the Second Circuit Court of Appeals. The government did not dispute this fact. Nevertheless, the Second Circuit refused to review the Fourth Amendment issues raised by Petitioner on the ground that those issues did not survive the plea of nolo contendere.

This Court has granted certiorari in cases after a plea of nolo contendere where the right of appeal was expressly reserved. *Jaben* v. *U.S.*, 379, *U.S.* 878. The Second Circuit Court of Appeals has indicated that it would review issues despite a plea of nolo contendere if the appellant notifies the trial court of his intention to appeal. *U.S.* v. *Doyle*, 348 F.2d 715, 720 (2 Cir. 1965). And the Second Circuit Court did in fact entertain an appeal after a plea of nolo contendere in *U.S.* v. *Grassia* — F.2d. — (p 18*a*) where the appellant reserved the right to appeal in the district court.

True, in this case, Petitioner's reservation does not appear

on the record. However, his uncontroverted statement of facts contained in the appeal to the Second Circuit is the equivalent of a statement for the record. Petitioner urges the Court to review the questions raised below.

III. The Affidavits Were Insufficient to Establish Probable Cause.

The Affidavit submitted in support of the search warrant may be summarized as follows:

1. A reliable informant who furnished reliable information in the past told the affiant that Petitioner was engaged in bookmaking activities.

2. Another reliable informant who furnished reliable information in the past told affiant that Petitioner was a bookmaker using telephone number 367-8261.

3. Telephone company records reveal that the above number is listed in Petitioner's name at the address to be searched.

4. Affiant's experience shows that calls to and from known bookmakers is indicative of the fact that a place is being used for bookmaking purposes.

5. Certain calls were made to and from known bookmakers.

6. Petitioner does not have a wagering tax stamp.

The bare allegations that the affiant was informed by a reliable informant that Petitioner was a bookmaker and that another reliable informant told the affiant that Petitioner was using a certain telephone number in his bookmaking activities

are insufficient. The magistrate must be informed of some of the underlying circumstances upon which the informant has based his conclusion. Otherwise the affidavit does not satisfy the probable cause requirement.

Aguilar v. *Texas*, 378 U.S. 108 (1964)

The affidavit may have properly established probable cause if, for example, it recited that the first informer knew petitioner was bookmaking because the informer placed a wager with Petitioner; or, that the second informer knew that Petitioner was using the stated telephone number in his bookmaking activity because he called that number and placed a wager with Petitioner. The "underlying circumstances" supporting the informer's conclusion need not be the result of personal observation by the informer, they may be based on hearsay. However termed, *Aguilar* requires that the magistrate be informed of them, otherwise the affidavit is insufficient. See *Jones* v. *U.S.*, 362, U.S. 257, where it was held that the affidavit did establish probable cause because it contained a statement explaining the basis of the informer's knowledge: he had purchased narcotics from defendant in the apartment sought to be searched.

With the elimination of that portion of the affidavit containing the informers' statements, very little remains in support of establishing probable cause. Petitioner contends that without the informers' statements the affidavit is not an allegation of probable cause.

Moreover, the allegation purporting to establish a pattern of telephone calls to and from known bookmakers was based upon a check of telephone company records from "April through September, 1964." The date of each call is not set forth, and the only conclusion to be reached from the allega-

tion is that sometime during the period of April through September, 1964, telephone calls were made and were of such a nature as to indicate a bookmaking operation.

This allegation must fail in contributing to the establishment of probable cause because it is too remote. Courts take the view that for the purpose of testing the remoteness of a statement reciting activity "within" a certain period of time, the statement must be treated as if the activity took place on the farthest remote date within the period.

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The telephone calls, therefore, should all be treated as having taken place sometime in April. Since the affidavit in support of the search warrant was executed in October, the facts recited to establish a pattern of calls indicating the existence of a bookmaking operation are too remote in point of time. *Ibid.*

IV. The Officers Were Not Refused Entry.

The affidavit of the federal agent describing the manner in which the search warrant was executed states that he knocked, announced his authority and purpose. He did not receive a reply so he tried the doorknob and found the door locked. He waited 20-25 seconds and then ordered that the door be broken.

Title 18 U.S.C.A., Section 3109 permits a forcible entry when officers are "refused entry." An affirmative refusal is not required before the officers may break in under this section. However, in all the cases decided to date, we find that the officers were held to have been justified in breaking in either because they heard sounds indicating that evidence was to be destroyed or because the occupants were attempting to escape. No case has been decided in which silence alone has been held

to be a refusal within the meaning of Section 3109. One case, *U.S.* v. *Viale*, 312 F.2d 595 (2d Cir., 1962) in a footnote statement, declared that silence alone was sufficient. That case is distinguishable from the case at bar, because in *Viale* the agents knew that the defendants were in the apartment; whereas there is no indication whatsoever that the agents in this case knew that Moretti was in the apartment.

The issue we raise does not concern the sufficiency or length of time that lapsed between the announcement of authority and purpose and the breaking of Petitioner's door. We do not expect this Court to render a "stop-watch" decision. We are concerned with heart of the statute. "Refused entry" is not defined in the statute; we concede that there need not be an affirmative refusal. Nevertheless, there must be a refusal, whether it be implied, inferred, suspected or affirmative. Whatever the form of refusal, it can only come from an occupant. It is pure conjecture to conclude that police officers are refused entry to an unoccupied apartment because a response to their announcement is not forthcoming. No one is there to refuse them entry. The statute would prevent breaking into an unoccupied apartment to execute a search warrant. The Petitioner was present when the federal agents arrived to execute the search warrant. However, the silence that followed their announcement could only be indicative of the fact that the apartment was unoccupied. They could not conclude, because of the silence, that they had been refused entry.

CONCLUSION

For the reasons stated it is respectfully submitted that the court grant this Petition.

Respectfully submitted,

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